Supreme Court, U.S.
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No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

GEORGE WILLIAM LOWRY, III,

Petitioner,

v.

UNITED STATES

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. How many material omissions are necessary to violate the Fourth Amendment of the United States Constitution and deprive a Magistrate of the ability to make an informed, independent determination of probable cause, based on the totality of the circumstances and, how many material omissions deliberately withheld from the Magistrate does it take to rise to the level of reckless disregard for the truth thereby allowing a Franks hearing?

2. Did referring to the accused as a member of the Outlaw Motorcycle Club of Chattanooga lack relevance to the charges and therefore violate his First Amendment rights of association as outlined in this Honorable Court's recent decision of Dawson v. Delaware, decided on March 9, 1992?

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GEORGE WILLIAM LOWRY, III,

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On Petition for Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, George W. Lowry, III, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on April 22, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals, which is unreported, is set forth at A. (1a-25a).[1] The opinion of the District Court, on the pending motion in issue, which is also unreported, is set forth at A. (25a-33a). The District Court's findings relating to referring to Petitioner as a member of the Outlaw Motorcycle Club are set forth in the Excerpts from Suppression Hearing and Final Pre-Trial Conference at A. (34a-66a).

JURISDICTION

The judgment of the Court of Appeals was entered on April 22, 1992. This Court has jurisdiction pursuant to Title 28 U.S.C. § 1254(1).

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[1] References to "A." are to the appendix to this petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or bridging the freedom of speech, . . . or the right of the people to peaceably assemble...

STATEMENT OF THE CASE

From approximately May of 1989 through October of 1989, an agent of the

Alcohol, Tobacco & Firearms Bureau (ATF) in Memphis, Tennessee, employed the services of a confidential informant. The ATF office in Memphis targeted the Outlaw Motorcycle Clubs in Tennessee and Georgia and used the confidential informant to infiltrate the Outlaw Motorcycle Clubs in Memphis, Nashville, Chattanooga, and Knoxville, Tennessee, and Atlanta Georgia.

The ATF knew the confidential informant had been arrested at least fifteen (15) times from the years 1971 through 1988. A. (67a-70a). The ATF paid the confidential informant over $14,000.00 to obtain information to support search warrants of the Outlaw Clubhouses.

Based solely upon information obtained from the single confidential informant about what he saw at the Outlaw

Clubhouses, agents of the ATF obtained search warrants for the Clubhouses in Memphis, Nashville, Chattanooga, and Knoxville, Tennessee and Atlanta, Georgia. Additionally, search warrants were also obtained for at least three private residences of friends of Outlaws in Atlanta, GA, Nashville, TN and Memphis, TN. The ATF sent special agents to approach Magistrates in the corresponding districts at or about the same time to obtain search warrants of all the above mentioned club houses. The plan was to surprise all the Outlaws at once, and to that end, all the search warrants were executed on October 11, 1989 at approximately 9:00 a.m.

The search warrant affidavits in each of these districts contained basically the same information about the single confidential informant. Each

Magistrate was advised by each ATF officer in the corresponding district that the confidential informant had provided information in the past which had been proven to be true and that the information had resulted in the arrest of seven persons for various criminal offenses in the past. Three of these seven persons were said to have already pled guilty in the United States District Court for the Western District of Tennessee.[2] This information was basically the only information supplied to the Magistrates about the confidential informant's veracity.

The confidential informant reported that he basically saw pounds of marijuana, ounces of cocaine and ounces

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[2] Exhibits 1-9 to Petitioner's Motion to Suppress Hearing.

of methamphetamine at each club house.

The ATF agents did not advise the Magistrates of the following facts:

1. The confidential informant had a lengthy arrest record including aggravated kidnapping, auto theft, burglary, bad checks, impersonating a police officer, carrying a weapon, aggravated assault, concealing stolen property, felony bad checks, receiving and concealing stolen property, and being a felon in possession of firearms. (Please see A.(67a-70a) for a complete list of arrests).

2. The confidential informant never wore a wire nor was under any surveillance at any time during his alleged visits to the Outlaw Clubhouses.

3. None of the confidential informant's information was corroborated in any way. He never made a buy nor obtained a sample of any drug.

4. The confidential informant was promised and placed on the witness protection program.

5. The confidential informant was the exclusive source of information about contraband at the Clubhouses.

6. There was no specific information as to the location of any drugs or contraband.

7. The confidential informant was being used by the ATF to obtain eight (8) search warrants in five cities across Tennessee and Georgia, all to be executed at the same time.

8. The confidential informant was paid at least $14,000.00 for the information he gave the ATF agents about the Outlaw Motorcycle Clubs.

The arrest of the Petitioner stems from the raid on the Chattanooga Outlaw Motorcycle Clubhouse. Among various items seized in the raid was a .45 caliber handgun from Petitioner's bedroom. The Petitioner was indicted on October 10, 1990, charging him in a one count indictment as a previously convicted felon with possession of a firearm under Title 18 U.S.C. § 922(g)(1). Petitioner filed a motion and brief to suppress the seized evidence,

claiming that the search warrants were obtained in bad faith and in violation of the Petitioner's Fourth Amendment privileges.[3] The Petitioner asked for a Franks Hearing. Franks v. Delaware, 438 U.S. 154, 198 S.Ct. 2674, 57 L.Ed. 2d 667 (1978).

The Petitioner also filed a motion to preclude the Government from referring to the Petitioner as a member of the Outlaw Motorcycle Club during trial. Petitioner argued that no action by the Petitioner involved any member of the Motorcycle Club and reference to Petitioner as an Outlaw Motorcycle Club member was not relevant to the issue of whether Petitioner possessed a weapon. The references would only have a negative

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[3] Motion to Suppress - Docket #13.

connotation and unduly prejudice the Petitioner at trial.[4]

A pretrial conference was conducted on June 25, 1991, and the above motions were argued. Petitioner asserted that the search warrant was obtained through reckless and misleading statements to the Magistrate and argued that material omissions bearing on probable cause denied the Magistrate access to all the facts in which to make independent finding of probable cause based on the totality of the circumstances. At the pretrial motion hearing, the Petitioner offered to produce live witnesses to demonstrate the inaccuracies in the search warrant. The Government conceded at the hearing that the search warrant

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[4] Motion to Exclude Referring to the Defendant as a Member of the Outlaw Motorcycle Club. Docket #9.

was issued based primarily on statements of one confidential informant and the Government also conceded, for purposes of whether an evidentiary Franks hearing was appropriate, that all the information supplied by the confidential informant was false. A. (50a). The Court denied an evidentiary hearing. Petitioner proffered all the above mentioned search warrants with supporting affidavits as exhibits.

On June 27, 1991, the trial court's order A. (25a) denied the Petitioner's motion to suppress evidence for a lack of showing that any of the contents of the affidavits were deliberate falsehoods or made with reckless disregard for the truth. A. (26a).

The order further denied the Petitioner's motion to exclude references to himself as a member of the Outlaw

Motorcycle Club. The court found that reference to the Outlaws was relevant because the Court did not:

> "think it's possible to try the case without reference to the Motorcycle Club or the fact that he is a member. You know, it's just. . . it's just not going to be able to be done, and for that reason, I think its relevant in the sense. I mean, otherwise, the story that the Government is going to want to tell here just doesn't make sense."

A. (60a).

At trial, the Government took every opportunity to inform the jury that the Defendant was a member of the Outlaw Motorcycle Club. The Government informed the jury that Outlaws wear tatoos with the letters "F.T.W." which stand for F-U-C-K the world. The Government talked about swastikas at the Clubhouse and stated that the very word Outlaws means outside the law.

The case was submitted to a jury on

July 2, 1991, and the Petitioner was found guilty of the one-count indictment. Judgment was entered on September 30, 1991 and the Petitioner filed a Notice of Appeal to the Sixth Circuit Court of Appeals on October 4, 1991.

The Sixth Circuit Court of Appeals ruled that referring to the Petitioner as a member of the Outlaw Motorcycle Club was relevant because the Petitioner's wife had a jacket bearing the Outlaw insignia and the phrase "Property of the Outlaws." Furthermore, the Appellate Court found that a witness testified that he was not a member of the Outlaw Motorcycle Club, but he rode a Harley Davidson motorcycle and he had friends that were members of the Outlaws. The Appellate Court stated therefore reference to the Petitioner as an Outlaw Motorcycle Club member was relevant to

show bias on the part of these two witnesses. A. (13a).

The Appellate Court further ruled that the Petitioner was not entitled to an evidentiary hearing under Franks v. Delaware, 438 U.S. 154 (1978). The Appellate Court ruled that there was no reason to believe that the Magistrate was seriously mislead by the omission of information about the informant "which was only of general impeachment value and had no direct bearing on the substance of the informant's information." A.(21a) The Appellate Court relied on the single statement that the informant had been reliable in the past by causing the arrest of seven persons.

The judgment of the District Court was therefore affirmed in all respects by the Sixth Circuit Court of Appeals on April 22, 1992.

REASONS FOR GRANTING THE WRIT

I. (a) The Sixth Circuit has rendered a decision in conflict with other circuits. (b) The Sixth Circuit has decided an important question of federal law which has not been, but should be, settled by this Honorable Court.

Petitioner has been unable to locate, and therefore believes, that this Honorable Court has never addressed what affect material omissions have in the context of a search warrant application. Almost all the circuits have discussed whether a Franks hearing is required when allegations of material omissions are claimed. There is however, lack of uniformity between the Circuits. See for example, the discussion in United States v. Reivich, 793 F.2d 957 at 962 (8th Cir,

1986). The Court in Reivich discusses how some circuits have extended the Franks rational to cover omissions. The Reivich Court points out that other circuits have interpreted Franks in a different manner.

A footnote in United States v. Ippolito, 774 F.2d 1482 at 1486-87 (9th Cir. 1985), states

> If an affidavit can be challenged because of material omissions, the literal Franks approach no longer seems adequate because, by their nature, omissions cannot be deleted.

The Ippolito Court then goes on to set forth two different approaches when dealing with omissions. Id at 1487. Further extension of Franks was discussed in United States v. Williams, 737 F.2d 594 (7th Cir. 1984) where the court reasoned:

It is further plain that if the

> challenger is permitted to marshall all exculpatory facts [ie. adding omissions], fairness dictates that the government be allowed to support the affidavit with additional inculpatory information known to the affiant at the time the affidavit was made.

United States v. Williams, 737 F.2d 594, 604 (7th Cir. 1984) cert. denied, 470 U.S. 1003, 105 S.Ct. 1354, 84 L.Ed.2d 377 (1985).

The Sixth Circuit Court of Appeals' decision upholding the validity of the search warrant in the case at bar is in conflict with established law in the DC Circuit, Second Circuit, Fifth Circuit, Seventh Circuit, Eighth Circuit, Ninth Circuit, Tenth Circuit and Eleventh Circuit, and sets forth yet another approach in dealing with omissions.

The Sixth Circuit Court of Appeals in their Opinion in this case,

distinguished between omissions of potentially impeaching material and inclusions of affirmatively false information, giving the latter more weight than the former. A. (19a). The Circuits cited above clearly establish and hold that "allegations of material omissions [are] to be treated essentially similarly to claims of material misstatements." United States v. Martin, 615 F.2d 318, 328 (5th Cir. 1980). United States v. Johnson, 696 F.2d 115, 118 (DC Cir. 1982) holds "the reasoning of Franks logically extends. . . to material omissions." See Stewart v. Donges, 915 F.2d 572 (10th Cir. 1990) at page 582 for a discussion of the holding of the Circuits that are in conformity.

The Sixth Circuit and other circuits have decided important questions of law which have not been, but should be,

settled by this Honorable Court. The important questions of law are:

> Should courts treat allegations of material omissions similarly to claims of material misstatements?
>
> Are all or any of the omitted facts in this case material omissions? (See page 7 supra for a full list).
>
> Does the cummulative effect of all these omissions infer a reckless disregard for the truth or show an intent to mislead the magistrate in each of the 5 district courts where the search warrants were obtained?
>
> Does the totality of the omissions require a Franks hearing?
>
> How should material omissions be treated under the Frank's doctrine?

In the case at bar, the Sixth Circuit found that the listed omissions were "only of general impeachment value and had no direct bearing on the substance of the informant's

information." A. (21a). All the omissions demonstrate that the confidential informant had a motive, opportunity and ability to lie. The confidential informant's veracity always bears on the issue of probable cause. And, if the omissions had been included, the trustworthiness of the confidential informant would have been brought into question.

Petitioner requested a Franks Hearing pre-trial, to demonstrate the search warrant was obtained by an affiant who deliberately withheld material facts that bore on probable cause. In Franks, this Honorable Court reasoned that a police officer should not be able to use deliberately falsified allegations to demonstrate probable cause, and, having mislead the magistrate, then be able to remain confident that the ploy was

worthwhile. Franks v. Delaware, 438 at 168, 57 L.Ed.2d at 680. The magistrate should make an "independent examination of the affiant." Id at same pages.

In the case at bar, the affiants withheld facts from the magistrates. The impression left in the minds of the magistrates was one of utter confidence in the confidential informant. A majority of Circuits, excluding the Sixth Circuit, has held that material omissions are to be treated as intentional misstatements. Stewart v. Donges, 915 F.2d 572, 582 (10th Cir. 1990) and cases cited therein from the DC Circuit, Second Circuit, Fifth Circuit, Seventh Circuit, Ninth Circuit and Eleventh Circuit. United States v. Collins, 549 F.2d 557, 561 (8th Cir. 1977), cert denied 431 U.S. 940, 97 S.Ct. 2656, 53 L.Ed.2d 259 (1977), also found that omissions should

be viewed as misrepresentations.

In United States v. Park, 531 F.2d 754, 758 (5th Cir. 1976), it was held if a "misrepresentation is made with the intention of deceiving a magistrate, it will invalidate the warrant regardless of whether the error is material." In the case at bar, the Petitioner assert that when all the omissions are taken together, it becomes apparent that the ATF was deceiving the magistrates and not letting the magistrates know that the ATF was on a fishing expedition. Petitioner asserts the ATF devised a plan to raid all the Outlaw Clubhouses and found a worm in the form of their confidential informant, that gave them false information and a license to go fishing. This type of police activity should invalidate the warrant.

Without this Honorable Court putting

an end to this kind of abuse, law officials will only get bolder and their confidential informants will only become more questionable.

Franks v. Delaware sets a standard of review to test the veracity of a search warrant after its execution. The proper analysis is as follows:

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. The affidavits or sworn or otherwise reliable statements of witnesses should be furnished or their absence satisfactorily explained.

Franks v. Delaware, 437 U.S. at 171, 57 L.Ed.2d at 682.

Petitioner met the Franks standard in the case at bar. Petitioner alleged that the ATF officers made statements in reckless disregard for the truth by omitting material facts about the confidential informant's credibility. At the Suppression Hearing, Petitioner argued that material omissions not stated to the magistrates can rise to the level of an inference of recklessness. A. (40a). Petitioner proffered proof of deliberate material omissions. Petitioner also proffered live witnesses at the Suppression Hearing to show that the statements in the affidavit were false.

Franks dictates a suppression hearing when allegations of deliberate falsehood or statements of reckless disregard are made by the affiant. The majority of Circuits now hold that material omissions should be treated as

deliberate falsehoods. The Petitioner stressed pretrial that material omissions, withheld from each magistrate by the affiants, rose to the level of false statements made by the affiants, or at least statements made in reckless disregard. A. (34a - 49a).

Franks v. Delaware holds that a magistrate must make an independent and detached determination of probable cause in order to issue a search warrant. It stands to reason that a magistrate cannot make an independent nor proper determination of probable cause if material facts bearing on probable cause are deliberately withheld from the magistrate by the affiant, as in the case at bar. Massachusetts v. Upton, 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984), holds that a magistrate should look at the "totality of the circumstances" when

determining whether probable cause exists to issue a search warrant. This Honorable Court has repeatedly held and reaffirmed "the totality of the circumstances analysis that traditionally has informed probable cause determinations." Massachusetts v. Upton, 466 U.S. at 732, 80 L.Ed.2d at 727, 104 S.Ct. at 2087.

This Honorable Court has held that:

> where the affiant relies upon the assertions of confidants to establish probable cause, the affidavit must set forth facts which enable the magistrate to judge for himself both the probable credibility of the informant, and the reliability of his information. For only if this condition is met can a reviewing court be satisfied that the magistrate has fulfilled his constitutional duty to render an independent determination that probable cause exists."

United States v. Harris, 403 U.S. 573, 588, 91 S.Ct. 2075, 2084, 29 L.Ed.2d 723, 736 (1971); Aguilar v. Texas, 378 U.S.

108, 12 L.Ed.2d 723, 84 S.Ct. 1509, (1964); Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 637 (1969).

If the magistrate must judge for himself the probable credibility of the informant, it stands to reason that all elements of the confidential informant's character (ie, arrest record) should be told to the magistrate. This theory is buttressed by the request that probable cause be determined by the totality of the circumstances. Massachusetts v. Upton, 466 U.S. 727, 732, 104 S.Ct. 2085, 80 L.Ed.2d 723, 724 (1984); Illinois v. Gates, 462 U.S. 213, 238, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983).

The ATF agents only stated the positive aspects about their confidential informant. The magistrates were denied the ability to make an informed and

detached determination of probable cause. Had they been told the whole truth, the search warrant applications would have taken on a completely different smell.

In conclusion, Petitioner respectfully requests this Honorable Court grant his Writ. After a full hearing, Petitioner believes that the facts will dictate suppression of the evidence or at least a Franks hearing.

II. The Sixth Circuit has decided a federal question in a way that conflicts with applicable decisions of this Court.

Petitioner's Second Issue is also cause to grant review or Writ of Certiorari. The Sixth Circuit decided a federal question in a way that conflicts with this Honorable Court's recent decision in Dawson v. Delaware, 60 U.S.L.W. 4197, Slip Op. No. 90-6704 (U.S. March 9, 1992).

On June 5, 1991, Petitioner moved pretrail to exclude referring to the Petitioner as a member of the Outlaw Motorcycle Club. (Docket 9). Petitioner argued in his brief that any mention of Petitioner's affiliation with the Outlaw Motorcycle Club would be highly prejudicial and not at all relevant to the issues of whether Petitioner

possessed a weapon as a convicted felon. The District Court ruled that the U.S. Government could refer to the Petitioner as a member of the Outlaw Motorcycle Club. The District Court stated:

> I just don't think. . .it's a practical matter, I don't think it's possible to try the case without reference to the motorcycle club or the fact that he is a member. You know, it's just--it just isn't going to be able to be done, and for that reason, I think it is relevant in that sense. I mean, otherwise, the story the Government is going to want to tell here just doesn't make sense, --
> A. (60(a).

The District Court addressed the question of relevancy without the benefit knowing what the testimony would be at trial. The Sixth Circuit Court of Appeals, on the other hand, only addressed the question of relevancy through the relationship of Petitioner's

wife as a witness and the testimony of Jens Stendera. Mr. Stendera was a witness who testified that he had friends that were Outlaws. The Circuit Court reasoned that since Petitioner's wife had a jacket with the Outlaw insignia on it and a statement stating "Property of the Outlaws" that her relationship to the Outlaw Club was relevant to show bias. A. (13a). The Circuit Court also reasoned that Jens Stendera was a friend of the Outlaws and therefore discussing whether the Petitioner was an Outlaw was relevant in respect to Jens Stendera's potential bias. The Circuit Court relied on United States v. Able, 469 U.S. 45, 105 S.Ct. 465, 85 L.Ed.2d 450 (1984). A. (12a).

In Able bias was relevant because the prosecutor made it relevant. Gang membership was relevant to show the bias

of the witness because there was evidence that the member was a gang member and the proof showed that the tenents of the gang required its members to lie for one another when required. United States v. Able, 469 U.S. at 47, 105 S.Ct. at 467, 83 L.Ed.2d at 454.

In the case at bar, the reference to Petitioner's membership as an Outlaw Motorcycle Club member was never made relevant. The prosecutor never showed that being a member of the gang made his testimony or anyone else's subject to dispute. Nor did the prosecutor ever produce any evidence that the Petitioner was more likely to possess a gun because he was an Outlaw Motorcycle Club member.

This Honorable Court ruled in Dawson v. Delaware, 60 U.S.L.W. 4197, Slip Op. 90-6704, (U.S. March 9, 1992) that the Judge improperly allowed the jury to

consider whether the Defendant was a member of a prison gang. This Honorable Court ruled that the reference to gang membership was irrelevant for sentencing purposes. This Honorable Court reasoned that since there was no relevance to referring to the Defendant as a gang member, the Defendant's First Amendment rights were violated.

The Sixth Circuit relied on United States v. Able when ruling on Petitioner's Appeal. The Sixth Circuit relied upon the United States Supreme Court's holding in Able that "[a] witness's and a party's common membership in an organization, even without proof that the witness or party has personally adopted its tenents, is certainly probative of bias." A. (12a). However, in the case at bar, there is no proof of any "tenents" to which the Outlaw

Motorcycle Club ascribes.

The Sixth Circuit never addresses whether the District Court erred in determining that referring to the Petitioner as a member of the Outlaw Motorcycle Club was relevant in the first instance, pre-trial.

In conclusion, the Petitioner was denied his constitutional free rights of association because the Government was allowed to try the Petitioner as an Outlaw. The Petitioner's association with the Chattanooga Chapter of the Outlaw Motorcycle Club had no relevance to whether the Petitioner possessed a weapon. The Government never made the connection relevant. Petitioner prays that this Honorable Court enter a ruling that Petitioner is entitled to a new trial without the reference to the Outlaw

Motorcycle Club.

Respectfully Submitted,

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APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 91-6169

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

GEORGE W. LOWRY, III,
Defendant-Appellant.

On Appeal from
the United States District Court
for the Eastern District of Tennessee

[Filed April 22, 1992]

Before: MILBURN and SUHREINRICH, Circuit Judges; and COHN, District Judge.*

PER CURIAM. Defendant George Lowry, III, appeals his jury conviction for

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*Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1). On appeal, the issues are (1) whether district court abused its discretion by permitting references to the Outlaw Motorcycle Club ("Outlaws") during the government's cross-examination of defense witnesses and during closing argument, (2) whether there was sufficient evidence to support the conviction, and (3) whether the district court erred in overruling defendant's motion to suppress the weapon introduced in evidence against him. For the reasons that follow, we affirm.

I.

On October, 8, 1989, the United States Magistrate issued a search warrant authorizing the agents of the Bureau of Alcohol, Tobacco and Firearms ("ATF") to

search the Outlaw compound in Chattanooga, Tennessee. In an affidavit in support of the warrant, it was alleged that a confidential informant had been inside the Outlaw compound on four occasions and that on each occasion he had seen firearms and controlled substances in plain view. Defendant was present on each of these occasions.

The affidavit recited that "the confidential informant has provided information in the past which has proven to be true and accurate based upon independent investigation resulting in the corroboration of such information on many occasions." J.A. 122. It also recited how the confidential informant had recently provided information that had resulted in the arrest of seven persons, three of whom had already entered guilty pleas in another district

court. The informant's information was reinforced by affiant's recitation of defendant's criminal record which included convictions for possession of marijuana, three counts of auto theft, and possession of a firearm by a felon.

On October 11, 1989, law enforcement officers executed the warrant at the Outlaw compound. Upon entering the compound, ATF Agent Scott saw defendant, whom he recognized, looking out the window of a bedroom later identified as the defendant's bedroom. When officers searched the room, they discovered a loaded .45 caliber semi-automatic pistol on the top shelf of a phonograph cabinet next to the bed. On another table, police found drug paraphernalia, ammunition, and a pouch containing $500 in cash. They also discovered $27,000 in cash in a safe next to the table. There

were other weapons and some marijuana found in other parts of the house.

After the district court overruled defendant's motions to suppress evidence and to prohibit the government from referring to him as a member of the Outlaw Motorcycle Club, defendant testified that he tried to go to bed in the early morning hours of October 11, 1989, but found Jens Stendera, a visitor, already asleep in his bed. Defendant, therefore, spent the night on the couch. He denied all knowledge of the handgun.

On cross-examination, he admitted his prior felony convictions, that he had previously possessed a .45 caliber automatic pistol, that he used aliases to deceive people, and that he was proud to be an Outlaw. He further admitted that the room in which the pistol was found was his bedroom. His wife, Pamela Lowry,

testified for him and admitted owning a jacket bearing the legend, "Property of the Outlaws".

Jens Stendera also testified as a defense witness. He claimed to be a former German law enforcement officer and produced a document purporting to be a license to carry a concealed weapon issued by the State of Florida. The license did not identify the gun he was permitted to carry. Stendera testified that the pistol found in the defendant's bedroom belonged to him. He further testified that he had a bill of sale showing his purchase of the gun from a friend in Knoxville and that he had had this bill of sale in his possession at the time of the search. He admitted, however, that he did not inform the search team of his ownership of the pistol or of his bill of sale, and he

never claimed the pistol.

On July, 2, 1991, defendant was convicted of being a felon in possession of a firearm in violation of 18 U.S.C § 922(g)(1), and on September 30, 1991, he was sentenced to a term of imprisonment of twelve months and one day. This timely appeal followed.

II.

A.

Defendant argues that the district court erred in denying his pretrial motion for an order directing the government to refrain from referring to him as a member of the Outlaw Motorcycle Club. Defendant insists that any such references were irrelevant and that the court therefore abused its discretion in overruling his motion. The district court thought it practically impossible

to try the case without a reference to the Outlaws.

> THE COURT: I don't think that the unfair prejudice outweighs the probative value here. And basically, I -- number one, I don't think it's -- just a mention of the name Outlaws or the reference to the name Outlaws, it hasn't been shown to me that that in itself generates any unfair prejudice.
>
> I mean maybe its prejudicial to some extent just because of the fact that you're going to have some testimony, maybe, I don't know, you say that there's going to be testimony from officers that say that people in motorcycle groups have guns. I guess it's prejudicial to that extent, but it's not unfairly prejudicial, that's what Rule 403 talks about.

J.A. 59. The district court then offered a cautionary instruction that would prohibit the jury from inferring criminal propensity from membership in any club, and the cautionary instruction was given.

A district court's ruling on evidentiary matters is reviewed for an abuse of discretion. Schrand v. Federal

Pac. Elec. Co., 851 F.2d 152, 157 (6th Cir. 1988). An abuse of discretion exists where the reviewing court is firmly convinced that a mistake has been made. Id. at 157. Additionally, in order to justify reversal, the error must affect a party's substantial rights. Id.; see also Zalem v. City of Cleveland, 906 F.2d 209, 215-216 (6th Cir. 1990), cert. denied, 111 S.Ct. 1388 (1991). The error is not harmless unless the court can say with fair assurance that the error did not affect the outcome of the case. Zalem, 906 F.2d at 215-216. This determination is guided by such factors as the closeness of the case and whether the evidence bears heavily on a dispositive issue. Schrand, 851 F.2d at 157.

Defendant argues that the government's cross-examination of Mr.

Stendera and the defendant's wife, Pamela Lowry, concerning their association with the Outlaw Motorcycle Club was improper because it called for irrelevant testimony. However, defendant's argument fails to take into account the government's purpose for adducing this proof, namely, to show bias as a means of attacking credibility. Mrs. Lowry admitted that she had a jacket bearing Outlaw insignia and the phrase "Property of the Outlaws". Furthermore, although Stendera testified that he was not a member of the Outlaw Motorcycle Club, he admitted that he rode a Harley-Davidson motorcycle and that he had friends who were members of the Outlaws. He further testified that he was visiting the Outlaws' clubhouse because his motorcycle had broken down and because he had a local friend who was a member of the

Outlaws.

Viewed in the light most favorable to the government, this evidence shows that defendant and both of his witnesses had common connections to or associations with the Outlaw Motorcycle Club or its membership. Proof of bias by a common club membership or association is a permissible means of attacking witness' credibility, and these witnesses' associations with the Outlaws made the existence of their bias towards the defendant more probable.

The Supreme Court has defined bias as follows:

> Bias is a term used in the "common law of evidence" to describe the relationship between the party and the witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest. Proof of bias is <u>almost always relevant</u>

> because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and the truth of a witness' testimony.

United States v. Abel, 469 U.S. 45, 52 (1984).[1] In Abel, the Court also held that "[a] witness' and a party's common membership in an organization, even without proof that the witness or party has personally adopted its tenets, is certainly probative of bias". Id. Although Mrs. Lowry and Stendera may not

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[1]The Supreme Court has recently reaffirmed Abel in Dawson v. Delaware, 60 U.S.L.W. 4197 (U.S. Mar. 9, 1992). Dawson itself is applicable to this case because there the Court decided that a stipulation of defendant's connection with the Aryan Brotherhood, a prison gang, was simply irrelevant to the capital sentencing hearing. The state did not follow through with proof that the Aryan Brotherhood endorsed or committed violent acts against minorities, and thus the stipulation showed only defendant's abstract beliefs. Its admission into evidence, therefore, violated defendant's First Amendment right to freedom of expression.

have been members of the Outlaw Motorcycle Club, it was proper for the government to prove their associations with that club in order to reinforce the inference that they would lie to protect the defendant. Thus, viewed in the light most favorable to its proponent, this evidence was relevant, and the district court committed no error in admitting it.

Defendant also argues that the government misused defendant's association with the Outlaws in its closing argument. In particular, he contends that the government's argument to the jury was improper at two different points:

> Now, think about it. Outlaws. Why, the very word itself means outside the law. They don't think they have to obey the law. The Defendant doesn't think he has to obey the law..

J.A. 112.

> But I suggest to you somebody that hangs out with Outlaws is not a person that you should believe, not when it contradicts all human nature and the facts of this case.

J.A. 113.

Although the defendant did not object to either argument by the government, he now contends that this court must review the arguments for error, not plain error. Defendant argues that his motion in limine to restrict references to the Outlaws must be taken as a standing objection, not only to the admission of testimony concerning the defendant's or his witnesses' relationship to the Outlaws, but to any possible use in argument to which such evidence might be put.[2] On the other

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[2]Although defendant cites Douglas v. Alabama, 380 U.S. 415, 422 (1965), and United States v. Vandetti, 623 F.2d 1144, 1146 (6th Cir. 1980), in support of his argument, those cases do not support him.

hand, the government argues that defendant's failure to object to its argument limits this court to a review for plain error affecting substantial rights.

However, it is clear that to interpret the motion in limine as defendant argues would frustrate the purpose for the rule requiring contemporaneous objections to matters in argument, i.e., that the district court should have improper argument brought to its attention and should be afforded the opportunity to stop it or correct it by instructions or otherwise. In this case, defendant not only made no objection to the government's argument at the time it was made, but he also failed to avail himself of post-trial remedies such as those provided under Federal Rule of Criminal Procedure 33. Under these

circumstances, the alleged errors will be reviewed only for plain error.

Plain error is such error as "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." United States v. Meyers, 952 F.2d 914, 917 (6th Cir. 1992) (quoting United States v. Young, 470 U.S. 1, 15, 105 S.Ct. 1038, 1046 (1985)). As we explained in Meyers, "inappropriate remarks by the prosecutor do not alone justify reversal of a criminal proceeding, as long as the jury's ability to judge the evidence fairly remains intact." Id. at 917 (quoting United States v. Castro, 908 F.2d 85, 89 (6th Cir. 1990)).

In this case, the jury's ability to judge the evidence fairly could not have been overborne by any error in the government's argument. The argument was

mainly temperate and correct, focusing on the questions of credibility that dominated the case. There was no improper argument "so pronounced and persistent that [it permeated] the entire atmosphere of the trial," Meyers, 952 F.2d at 917, and, therefore, there was no plain error in the government's argument.

B.

Defendant argues that the district court erred in failing to grant him an evidentiary hearing on his motion to suppress. He contends that under Franks v. Delaware, 438 U.S. 154 (1978), an evidentiary hearing was required because the agent-affiant in this case displayed a reckless disregard for the truth by omitting from the affidavit certain discrediting information about the confidential informant . In particular,

defendant insists that Agent Scott, the affiant in this case, did not inform the magistrate that the informant was paid $14,500 by the Bureau of Alcohol, Tobacco and Firearms, that the informant had a lengthy criminal record including gun possession charges, and that there was no independent corroboration to substantiate the informant's information. The district court rejected defendant's arguments because it found the informant's reliability and credibility to be established within the affidavit by assertions that his information had proven to be true in previous cases and that it had resulted in the arrest of seven persons, three of whom had already pled guilty. The court concluded that "the Constitution does not require a full-blown trial, evidentiary hearing every time a search warrant is issued."

J.A. 53.

The question of whether the alleged omission of information concerning an informant's character vitiates a warrant is a question of law subject to de novo review on appeal. See Whitney v. Brown, 882 F.2d 1068, 1071 (6th Cir. 1989), and Loudermill v. Cleveland Bd. of Educ., 844 F.2d 304, 308 (6th Cir.), cert. denied, 488 U.S. 941 and 488 U.S. 946 (1988).

In United States v. Martin, 920 F.2d 393 (6th Cir. 1991), the defendant argued that the agent-affiant "never told the magistrate that his principle informant . . . was a person whose veracity was open to serious question." Id. at 398. In rejecting defendant's argument, we distinguished between omissions of potentially impeaching material and inclusions of affirmatively false information.

> While omissions may not be per se immune from inquiry, the affirmative inclusion of false information in an affidavit is more likely to present a question of impermissible official conduct than a failure to include a matter that might be construed as exculpatory. This latter situation potentially opens officers to endless conjecture about investigative leads, fragments of information, or other matters that might, if included, have redounded to defendant's benefit. The potential for endless rounds of Franks hearings to contest facially sufficient warrants is readily apparent.

Id. (quoting United States v. Colkley, 899 F.2d 297, 301 (4th Cir. 1990)).

In Martin, this court also noted that

> it is often people involved in criminal activities themselves that have the most knowledge about other criminal activities. As the Ninth Circuit observed:
>
> > It would have to be a very naive magistrate who would suppose that a confidential informant would drop in off the street with such detailed evidence and not have an ulterior motive. The magistrate would naturally have assumed that the informant was

> not a disinterested citizen. While the magistrate was not informed of the informant's probity, the magistrate was given reason to think the informant knew a good deal about what was going on at [the residence].

Id. at 398-99 (quoting United States v. Strifler, 851 F.2d 1197, 1201 (9th Cir. 1988), cert. denied, 489 U.S. 1032 (1989)).

There is no reason to believe that the magistrate judge in this case may have been seriously misled by affiant's failure to disclose information about the informant which was only of general impeachment value and had no direct bearing on the substance of the informant's information. Where, as here, the informant's reliability and credibility are otherwise established, defendant bears the very heavy burden of showing how mere impeachment material

could be so devastating that its omission constituted reckless disregard for the truth. Defendant did not carry such a burden in this case, and therefore the district court did not err in refusing to conduct an evidentiary hearing on the basis of defendant's proffers.

C.

Finally, defendant argues that there is insufficient evidence in the record to support his conviction. A defendant claiming insufficiency of the evidence bears a very heavy burden. United States v. Vannerson, 786 F.2d 221, 225 (6th Cir.). cert. denied, 476 U.S. 1123 (1986). The evidence is construed in the manner most favorable to the government, United States v. Green, 548 F.2d 1261, 1266 (6th Cir. 1977), and the relevant inquiry is "whether, after viewing the

evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979).

The evidence in this case is ample under the foregoing standards. The firearm in question was found in defendant's room within defendant's residence. Moments before the raid occurred, defendant was seen looking out the window of that very bedroom. The $27,000 in cash found in the safe in his bedroom may have furnished a sufficient motive, in the jury's eyes, for defendant's possession of a weapon, and the jury was free to reject defense testimony that Jens Stendera spent the night in that bedroom and owned the weapon in question.

This court has upheld convictions where firearms were found in a defendant's bedroom. United States v. Clark, 928 F.2d 733 (6th Cir.) (upholding conviction under 18 U.S.C. § 924(c) for using a firearm in relation to a drug offense) (per curiam), cert. denied, 112 S.Ct. 144 and 112 S.Ct. 240 (1991). Accord, United States v. McCoy, 781 F.2d 168, 171 (10th Cir. 1985) (firearm in defendant's bedroom sufficient to support conviction of felonious possession); United States v. Scarborough, 539 F.2d 331 (4th Cir. 1976) (guns found in bedroom sufficient to support conviction for felonious possession), aff'd, 431 U.S. 563 (1977). Viewed in the light most favorable to the government, there is ample evidence to support the jury's verdict in this case.

III.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

Case No. 1-90-124

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE WILLIAM LOWRY, III,
Defendant.

MEMORANDUM AND ORDER ON PENDING MOTIONS

[Filed June 27, 1991]

Defendant's Motion to Suppress
(Court File No. 13)

The defendant has moved to suppress a Llama .45 caliber semi-automatic pistol which was seized by agents of the Bureau

of Alcohol, Tobacco and Firearms ("ATF") pursuant to a search warrant. The search was conducted at the clubhouse of the Outlaw Motorcycle Club in Chattanooga, Tennessee. Defendant's compliant is that affidavits made by various law enforcement officers in support of the issuance of the warrant were false and that they were made by the officers knowingly and intentionally or with a reckless disregard for the truth. Franks v. Delaware, 438 U.S. 154 (1978). See United States v. Cummins, 912 F.2d 98 (6th Cir. 1990).

The problem with defendant's motion is that he is unable to make a substantial preliminary showing that any of the contents of the affidavits were deliberate falsehoods or made with reckless disregard for the truth as required by Franks, 438 U.S. at 171-172.

In Franks, the Supreme Court held that a defendant is entitled to a hearing if he alleges with specificity that the affiant engaged in perjury or reckless disregard for the truth and when the information so supplied is removed from the affidavit, probable cause to issue the warrant did not exist. Id. See United States v. Giacalone, 853 F.2d 470, 475 (6th Cir.), cert. denied, 488 U.S. 910 (1988).

The affidavit of Agent Scott related, inter alia, that ATF agents had been informed by a reliable informant who had made four visits to the Outlaw clubhouse, that there were firearms located there and that the defendant Lowry, who claimed to live at this location, had a felony record. This informant, said affiant Scott (who was quoting Special Agent McEntire, another ATF agent):

> . . . has provided information in the past which has been proven to be true and accurate based upon independent investigation resulting in the corroboration of such information on many occasions. SA McEntire also advised affiant that the confidential informant's information has resulted in the arrest of seven persons for various criminal offenses in the past few months. Three of these seven persons who have been arrested have already entered guilty pleas in the United States District Court for the Western District of Tennessee; one as a fugitive and the remaining three are awaiting preliminary hearings in state court.

Defendant proffered evidence (1) that the informant has criminal record, (2) that the informant had not in fact visited the Outlaw clubhouse on all of the occasions he said he did, (3) that the informant was being paid by the Government to be an informant, (4) that the informant was cooperating with the Government, and (5) that there were not any drugs or firearms at the clubhouse on numerous other occasions. However, the

defendant has proposed nothing which would in any way lead to an inference that ATF Agent Scott or any of the other affiants were telling deliberate falsehoods or had reckless disregard for the truth. It is true that the affiants did not tell the U.S. Magistrate Judge about the informant's criminal record, which may have affected the informant's credibility to some degree. However, any inference of untrustworthiness occasioned thereby is overcome by the unquestioned fact that the informant had provided reliable information leading to convictions in the past. See United States v. 1328 North Main Street, Dayton, Ohio 45405, 713 F.Supp. 1495, 1505 (S.D. Ohio 1988). Further, the Court's focus in determining whether a Franks hearing is warranted is upon the actions of the Government affiant, not the informant;

the defendant must make a "substantial preliminary showing" that the affiant originated the false statements or repeated them with reckless indifference to the truth. Giacalone, 853 F.2d at 475-76. See United States v. Barnes, 604 F.2d 121, 152-53 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980) (as long as the affiant accurately represents what he was told, the informant's perjury, if any, would not vitiate the search warrant).

Defendant's motion to suppress is DENIED.

Motion to Exclude 404(b) Evidence
(Court File No. 12)

The indictment in this case charges the defendant with being a convicted felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The

predicate felony is alleged to have been the identical offense, of which the defendant was convicted, on May 21, 1985, in the Western District of North Carolina.

Defendant wishes that the fact of his conviction be excluded under Fed. R.Evid. 404(b) and offers to stipulate that the defendant has been convicted of a felony.

The Government is entitled, indeed required, to prove at least one prior felony conviction before the defendant can be convicted of violating 18 U.S.C. § 922(g)(1). United States v. Ford, 872 F.2d 1231 (6th Cir. 1989), cert. denied, 110 S. Ct. 1946 (1990). The Court will DENY the defendant's motion to exclude this evidence which, in reality, is not 404(b) evidence but is evidence which the Government must produce in order to prove

its case. The Court, however, will give to the jury a special instruction regarding "other acts" advising the jury that it may not consider the prior conviction to prove the proposition that because he possessed a gun as a felon on an earlier occasion he therefore did the act that for which he is on trial in this case.

Motion to Exclude Referring to Defendant As a Member of the Outlaw Motorcycle Club (Court File No. 9)

For the reasons expressed on the record at the suppression hearing on June 25, 1991, the Court finds the references during the trial to defendant's club membership are not substantially outweighed by unfair prejudice to the defendant. Fed. R.Evid. 403. The Court, however, at the defendant's request, will

give a special jury instruction to the effect that the defendant is not to be convicted based upon his membership in any organization.

SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

Case No. 1-90-124

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE WILLIAM LOWRY,
Defendant.

EXCERPTS FROM
SUPPRESSION HEARING AND
FINAL PRETRIAL CONFERENCE

[June 25, 1991]

(pages 7-15, Suppression Hearing)

MR. LOMONACO: Yes, sir.

THE COURT: Now, in what way do you say that anything in any of the affidavits which were filed in support of the probable cause application were

intentionally made in reckless disregard for the truth?

MR. LOMONACO: Well, let me go to that, Your Honor, if I may, please. And I understand, Your Honor, please, because an officer is acting in good faith, even if the search warrant is later found to be defective, suppression isn't the appropriate remedy. I understand that, Your Honor, please.

But what this confidential informant did is he made statements to ATF officers that were relied upon, solely relied upon, no other information was used other than this confidential informant's information, nothing about those houses or what was supposedly in those houses.

And your question, getting to the question, Your Honor, is we have testimony that will say that those things aren't true. I think we have a two-prong

test in order to prevail in this suppression hearing, Your Honor, please. We have a two-prong test.

First of all, we have to show that the statements are false, the statements that the Magistrate relied upon are false.

THE COURT: Or made in reckless disregard.

MR. LOMONACO: And there was some reckless disregard to that. The reckless disregard aspects come in with what was not told to the Unites States Magistrate. Now, the cases --

THE COURT: Okay. So, you can't say that any of this is false. What you're saying is that the officer didn't tell some things to the Magistrate, is that what you're saying?

MR. LOMONACO: Not exactly, Your Honor, please. We're saying that's

false.

THE COURT: What evidence do you have, what showing, what preliminary showing can you make that anything, anything in this affidavit is false?

MR. LOMONACO: Well, Your Honor, we have outside on the bench out there a couple of witnesses, fact witnesses that will testify, for one thing, that a confidential informant wasn't there one of those days, he was down in Atlanta. We also have, Your Honor, please, conflicting affidavits from this same confidential informant that actually conflict on the dates where he was in Atlanta, Nashville and Knoxville.

For instance, Your Honor, please, in the Atlanta affidavit, he says he was there on the 3rd of September and the 4th of September. In the clubhouse in Atlanta, he was there on the 2nd and the

3rd of September. Now, at the same time, Your Honor, please, he says in the Chattanooga affidavit he was here on September 3rd, he was in three different places,

THE COURT: Well --

MR. LOMONACO: Another thing , Your Honor, please --

THE COURT: Well, motorcycles move around, you know, right? It takes about two-and-a-half hours to get from here to Atlanta.

MR. LOMONACO: We have a live witness, Your Honor, that will testify that the only time that this person was there was on May 1st, and at that time, there were no drugs in that house. That's live testimony, Your Honor, and I do not believe that it can be refuted.

If they bring that confidential informant up here, they might be getting

close, but I believe they won't bring him here, because they got too much baggage to bring him along with them, Your Honor, please, and nobody can refute the eye witness testimony that we have that shows and the unrefuted proof that these statements are false.

And, Your Honor, the reckless --

THE COURT: Well, whether or not they're false, you have to show more than that. You've got to show that when the officer made them, they were made knowingly and intentionally. In other words, that the officer knew that they were false at the time.

MR. LOMONACO: Or with reckless disregard.

THE COURT: Reckless disregard.

MR. LOMONACO: And that's where the omissions come in, Your Honor, please, the omissions made to the United States

Magistrate. The cases I cite say that if facts are omitted that bear on probable cause and the credibility of the confidential informant, those omissions can rise to the level of an inference of recklessness.

THE COURT: What authority do you have for that?

MR. LOMONACO: In the supplemental brief, Your Honor, please, that I submitted, the case of United States versus Martin, it's a Fifth Circuit case, 1980, and there's a Sixth Circuit case out of Ohio, United States versus 1328 North Main Street, that held that reckless disregard may be inferred by the omission of critical information bearing on probable cause.

THE COURT: Yeah, but in that case, one of the omissions complained of was that the officer did not reveal to the

Magistrate that the confidential informant had a record.

MR. LOMONACO: Yes, sir.

THE COURT: And they -- and the Court in that case specifically held that didn't make any difference in that case.

MR. LOMONACO: But there was a lot more --

THE COURT: As a matter of fact, they held that because the affiant did indicate that the confidential informant was reliable, and had provided the law enforcement authorities with accurate information, in this case, on twenty occasions, that that omission did not overcome the inference of trustworthiness that came along with the representation that the informant had furnished reliable information on other occasions.

And, of course, I believe we have that here, also. The officer does say

that the informant had provided information on other occasions, is that correct?

MR. LOMONA O: Yes, Your Honor. That -- Special Agent Bart McIntyre out of Memphis told the confidential informant -- told the other special agents that information, and that they included it in their search warrant applications.

However, Your Honor, please, and I understand that they did not find reckless disregard in that matter, but I think every case has to be looked at separately, and every case has different facts. And under the totality of the circumstances, which I believe the law says these cases have to be looked at, the egregious and the outrageous conduct of this confidential informant and the overreaching recklessness on the part of

the special agents all the way through the state of Tennessee and Georgia dictate, Your Honor, please, a different holding in this case.

This confidential informant, and there's a lot of things that tie into it, Your Honor, please, that were not in that case. This confidential informant has a history, and Your Honor probably saw the arrest record of the confidential informant that was submitted as an exhibit.

THE COURT: Yeah, I saw what you filed, yes.

MR. LOMONACO: He was arrested more times than probably all the members of the Chattanooga Outlaw motorcycle group put together, Your Honor, please.

THE COURT: You don't know that, do you?

MR. LOMONACO: I don't know that for a fact, Your Honor.

THE COURT: You're sure about that? You're willing to stand on a stack of Bibles and say that?

MR. LOMONACO: I think we added up in Knoxville, Your Honor, please, and i think that is the case in Knoxville. However, he started in 1970 and he quit being arrested four months before he turned an informer for the ATF. And it's interesting, his last arrest is a felon in possession of a gun, which I believe is the ATF's specialty.

And what I believe also, Your Honor, please, and I can't prove this, but I believe he's also under an agreement with them to work for them so they can go easy on that charge. That makes a lot of sense.

THE COURT: Mr. Lomonaco, you

practice criminal law, don't you, quite a bit?

MR. LOMONACO: Yes, sir.

THE COURT: You're experienced. That happens all the time, right?

MR. LOMONACO: Bears on probable cause.

THE COURT: That's something you bring out in cross examining a Government witness who's been cooperative with the Government,

MR. LOMONACO: Certainly.

THE COURT: That doesn't necessarily mean that a person is ipso facto a liar. I mean, you can consider that along with other factors, and that's what we tell juries, you know, in criminal cases.

MR. LOMONACO: Yes, sir.

THE COURT: They can consider that, but they don't have to assume that just because somebody has a criminal record,

he's an automatic liar.

MR. LOMONACO: No, sir.

THE COURT: And as a matter of fact, we have people in court testify all the time. I mean the Government would never have any informants if they took someone with a squeaky clean record like you and tried to use you as an informant.

MR. LOMONACO: Well, that's the fastest rehabilitation I have ever seen in the practice of law, please, Your Honor, is when an informant becomes an agent of the Government, they can do no wrong.

THE COURT: Well, that's the adversary process, right?

MR. LOMONACO: But also, Your Honor, please, it bears on probable cause and its omission, it was not made to the Magistrate, and it's an inference of recklessness according to case law. And

the fact --

THE COURT: Your haven't showed me any case, you haven't showed me one case that says omission of a criminal record of an informant means that there's reckless disregard, even under Franks versus Delaware.

MR. LOMONACO: Well, Your Honor, that's what the United States versus Martin holds, and that's what United States versus Main Street --

THE COURT: No, I just read from Main Street. Main Street doesn't hold that. I don't know about Martin. I don't have the Martin case. That's a 1980 case. As these cases, go that's sort of ancient.

MR. LOMONACO: Well, Your Honor, it didn't hold that the case should be set aside, but it did say that when omissions were made to the United States Magistrate

bearing on the probable cause --

THE COURT: Okay. I'll accept the proposition that there might be some cases where there is a conscious reckless intentional omission of something that might, that might raise a problem under the Franks rationale, but you haven't told me anything like that yet.

MR. LOMONACO: Can we look at those points, then, Your Honor, please, because there's a number of them?

THE COURT: Okay.

MR. LOMONACO: First of all, the long record, arrest record of the confidential informant.

THE COURT: I'm not impressed with that. Okay. Go to the next one.

MR. LOMONACO: The fact that no corroboration of the witness is ever given.

THE COURT: I'm not impressed with

that either. What's the next one?

MR. LOMONACO: Your Honor, when the confidential informant was used by the ATF -- let me list these, because I've got them listed in my brief here.

(Brief pause.)

MR. LOMONACO: He was paid over $14,000, please, in about five or six months' time for this information.

THE COURT: Well, from what is said, that's not -- that's not material.

(pages 32- 34, Suppression Hearing)

MR. LOMONACO: The research that I found, Your Honor, please, it questioned omissions, if they're critical omissions tending to demonstrate or not demonstrate probable cause, that sometimes those can rise to the level of recklessness.

THE COURT: The, in other words, the evidence that you want to offer here at

the hearing that you're proffering is just that the information -- that the information that's contained in these affidavits about what this informant saw or didn't see at the Chattanooga Outlaw location is not true, is that what your testimony is?

MR. LOMONACO: Yes, sir. If the Government would like to stipulate to that, we'll just bypass the evidentiary hearing, but if --

MR HUMBLE: For the purposes of this argument, I think the, you know, the Court can assume that those are the facts.

THE COURT: Okay. We'll just assume that those are the facts.

MR. LOMONACO: Okay, Your Honor, please. Then what we've done, then, is we've taken all the statements in the affidavit that are false and set them to

one side. Now, if those statements were made knowingly or intentionally or with reckless disregard --

THE COURT: Not by the informant but by the police officer.

MR. LOMONACO: Well, reckless disregard can be inferred through omitting certain statements. See, your Honor, you have to take all the statements given to the Magistrate at one time, and if the special agent goes in there and just takes a little bit of I've got a guy that's busted people before, and all this stuff over here saying he's scum of the earth and I wouldn't trust him with anybody, but he doesn't tell the Magistrate that, then the Magistrate doesn't have enough information to base his judgment on probable cause.

THE COURT: Okay. Let's put a merciful end to all this.

MR. LOMONACO: May I object -- go ahead.

THE COURT: Go ahead.

MR. LOMONACO: Your Honor, please, if the Court is not going to have a hearing on this, I would proffer, if I may proffer for the record copies of all the affidavits on all the clubhouses we've discussed, if I could make them an exhibit to the record please.

THE COURT: Okay. Sure. You may.

MR. LOMONACO: I appreciate that, Your Honor.

THE COURT: Okay.

MR. LOMONACO: Would you like us to have an evidentiary hearing at this time?

THE COURT: No. Your motion is denied. I don't think you've made a showing as required by Franks versus Delaware that any officer who filed an affidavit with the Magistrate in this

case made an intentional and knowing false statement with reckless disregard for the truth, and that's even assuming that everything, even assuming that your proof would show that there was never any drugs or never any guns or never anything -- not even any bugs, probably, out at the Outlaw place.

(pages 40-48, Suppression Hearing)

MR. LOMONACO: Our final motion, Your Honor, is asking that the Court instruct the United States Attorney's Office and the United States Attorney not to refer to the Defendant as a member of the Outlaw motorcycle gang. There's a certain way they do that, Your Honor, please, and I've never seen them do it nicely. It's just sort of a sneer when they say it.

THE COURT: Your client is not

ashamed of that, is he?

MR. LOMONACO: No, sir. No, sir, I don't believe he is. But it's sort of difficult, I think, when the U.S. Attorney says it without putting some sort of spin on it, Your Honor, please.

THE COURT: Well, okay.

MR. LOMONACO: I think that's the gist of my motion. If it were relevant, I would say I probably wouldn't have filed the motion, but it's not relevant, Your Honor. This could have been anybody's house, this could have been his mother's house. The fact it was at the Outlaw Motorcycle Club is not relevant to the fact that he possessed a gun.

They're going to argue, okay, Outlaw motorcycle members possess guns. Outlaw members possess guns. Well, to say it and to prove it with some --

THE COURT: I don't know. I don't

think they can argue that, unless there's evidence of that. I mean --

MR. LOMONACO: Your Honor, they're going to be --

THE COURT: There has to be --

MR. LOMONACO: There's going to be a special agent from the ATF and a special agent from the DEA. They're going to pu them on the stand, and they're going to say it's been my experience throughout the years that Outlaw motorcycle members carry guns. If he's an Outlaw, then he's probably going to have a gun.

THE COURT: So how are we going to handle this trial? We're going to call them the "Blank" motorcycle club or what are we going to call them? When they get on the stand, what are the agents going to say, "It's been my experience from the 'blank' motorcycle club always carries guns," or how do you handle this?

MR. LOMONACO: Why don't they just call him George Lowry? We had a search warrant, we believe there were drugs in the house, so the informant said, and we went into the house, we didn't find any drugs but we found a gun and we think it's his.

THE COURT: I'm sure you'd object to that. We're not going to let them testify as to what the informant said.

MR. HUMBLE: A minute ago he was complaining he wouldn't have a chance to cross examine the informant. We can bring him here.

THE COURT: We're not going to let that testimony come in.

MR. LOMONACO: Please do. I tried to subpoena him, Your Honor. I've been told he's under the witness protection program, or nobody knows where he is. They just have not produced him yet. I

take that back. Somebody knows where he is. But the question is, Your Honor, please, we've got twelve tried and true people in the jury. They don't have the sophistication of the ATF, they don't have the sophistication of the defense bar. They don't have the balance -- when I say something, I say it to do the best for my client. When the ATF says something, they do the best they can for their client or their side, but when a jury member is sitting there and here's a member of the Outlaw Motorcycle Club, that's going to put a connotation on that person without any proof. It's going to put a bad inference in the minds of the jury based on no facts.

And I guess we're looking at a little bit of the same argument we did with the last one, but maybe for a different reason. It shouldn't be

brought up, Your Honor, please, first of all, because it's not relevant. The Government doesn't need it to prove this case.

They can say they went into a house at 3014 wherever it was because they had a search warrant to execute. They went in, they executed the search warrant, they found a pistol, they believe he's a felon, they believe he's in possession of it. That's why they're here.

THE COURT: Okay. Mr. Humble, what do you say about that?

MR. HUMBLE: Well, Your Honor, first of all, if you'll indulge me a brief reaction, he may argue what he wants to for his client, but we try to tell the truth. I know the ATF better be telling the truth when they get on the stand.

MR. LOMONACO: Your Honor, I object to any reference that I'm not telling the

truth.

THE COURT: No, I don't think he's saying that.

MR. HUMBLE: No. But, Your Honor --

THE COURT: If he is, I don't give it any weight.

MR. HUMBLE: As I said, anyway, continuing, Your Honor, they're in the phone book. As you say, they're not ashamed of it. He says I'm going to sneer. I usually don't sneer too much, but whatever my reaction, if it's not accurate or true or fair, he can correct it. I don't see there being any -- any prejudice here. Besides, I think as you seem to be suggesting, we may have a practical problem in keeping this out.

One of the things that I'm going to prove is that he has an ownership interest in the house and the documents are all typed George Lowry and I think

two other people, d/b/a Outlaws Motorcycle Club. I mean, that's going to be part of my proof.

THE COURT: I just don't think as a practical matter, I don't think it's possible to try this case without reference to the motorcycle club or the fact that he's a member. You know, it's just -- it just isn't going to be able to be done, and for that reason, I think it is relevant in that sense. I mean, otherwise, the story that the Government is going to want to tell here just doesn't make sense, and --

MR. LOMONACO: Your Honor, I'd ask --

THE COURT: I'm not going to be -- I'm not going to be excising the Outlaws from documents that are going to be admitted, exhibits that are going to be admitted here in court. You know, I

would just ask you, Mr. Humble, tell you that, of course, when you're presenting the case, be careful how you say Outlaws, and don't put a spin on it.

MR. HUMBLE: I try not to overstate my cases, Your Honor. I won't -- I'll act within proper lines.

THE COURT: I don't see how the case will be tried without a reference to the organization and the Defendant's involvement in it. So I respectfully overrule the motion.

MR. LOMONACO: Your Honor, may I ask for a strong cautionary instruction?

THE COURT: I don't think that the unfair prejudice outweighs the probative value here. And basically, I -- number one, I don't think it's -- just a mention of the name Outlaws or the reference to the name Outlaws, it hasn't been shown to me that it generates any unfair

prejudice.

I mean, maybe it's prejudicial to some extent just because of the fact that you're going to have testimony, maybe, I don't know, you say there's going to be testimony from officers that say people in motorcycle groups have guns. I guess it's prejudicial to that extent, but it's not unfairly prejudicial, that's what Rule 403 talks about.

If it wasn't prejudicial, the Government wouldn't be offering it. And I think it does have probative value to the extent that I don't think the case is going to make sense in a lot of respects unless it's brought in.

MR. LOMONACO: Well, Your Honor, I would ask you for a strong cautionary instruction to the jury that they're not to take any undue inference off of that, that they're not to imply just because

they're Outlaws that they've committed a crime or that they're a member of the Outlaw -- because if they go into that, Your Honor, please, I believe I'm going to be permitted to bring character witnesses, I'm going to be permitted to bring other members of the Outlaws, speak about those that don't have a record, that don't have offenses, that don't carry guns, I believe I'm going to be able to bring all that information into this courtroom to counteract the DEA and the ATF getting up there and saying it's been their impression, it's been their experience throughout the years that the Outlaws are criminals that carry guns, because I believe they're going to do it, Your Honor, please. And, you know, we're going to have a lot of evidence.

THE COURT: We're anticipating a lot of evidence here that, you know, I'm not

sure we're going to get. I mean, I don't -- let's just cross that bridge when we come to it. You're entitled if you want to bring some character witnesses in for your client, you can do that.

MR. LOMONACO: I understand that, Your Honor.

THE COURT: Local rules limit them to three, however.

MR. LOMONACO: It could be an easy, simple case. It depends on how far back they want to go and how much Outlaw material they want to bring out before they make --

THE COURT: No. I don't think we're -- we're not in, we're not in here to try the Outlaw club, and I'm -- I'll just tell Mr. Humble, I'm sure he knows.

MR. HUMBLE: I have no intention of doing that, Your Honor.

THE COURT: We're not in here to try

the club. We're trying the Defendant. All I'm saying is that if it looks to me like the fact that whatever connection he has with the club is going to come up during the course of the trial, I'm not going to exclude it based upon the reasoning that you've given so far. That's all.

MR. LOMONACO: What was your ruling on the cautionary instruction, Your Honor, please?

MR. HUMBLE: We have no objection to it.

THE COURT: Sure, I'll give you a cautionary instruction that says that the jury, tell the jury that they shouldn't conclude that just because the Defendant's a member of any club that they can't find that he has any criminal propensity or --

MR. LOMONACO: We appreciate that,

Your Honor.

THE COURT: -- is guilty because of that.

MR. LOMONACO: Thank you.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

Case No. 1-90-124

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE WILLIAM LOWRY, III,
Defendant.

ARREST RECORD OF CONFIDENTIAL INFORMANT, SUPPRESSION HEARING EXHIBIT NO. 4

[June 25, 1991]

1. Arrested or received 4/29/71 - Memphis, TN Police Department; Charge: Suspect, larceny of auto; Disposition: unknown.

2. Arrested or received 8/30/71 - Memphis, TN Police Department; Charge:

malicious mischief; Disposition: unknown.

3. Arrested or received 1/18/72 - Memphis, TN Police Department; Charge: Suspect, burglary; Disposition: released.

4. Arrested or received 1/15/74 - Memphis, TN Police Department; Charge: burglary; Disposition: 1-3 years confinement.

5. Arrested or received 10/1/75 - Memphis, TN Police Department; Charge: violation of the Bad Check Law; Disposition: unknown.

6. Arrested or received 1/16/78 - Memphis, TN Sheriff's Office; Charge: passing bad checks; Disposition: 90 days confinement.

7. Arrested or received 4/13/78 - Memphis, TN Police Department; Charge: impersonating a police officer and

carrying a pistol; Disposition: 90 days confinement.

8. Arrested or received 11/24/78 - Memphis, TN Police Department; Charge: passing and drawing checks without sufficient funds; Disposition: 1 year confinement.

9. Arrested or received 11/26/82 - Memphis, TN Sheriff's Office; Charge: aggravated assault; Disposition: unknown.

10. Arrested or received 3/13/84 - Memphis, TN Sheriff's Office; Charge: receiving and concealing stolen property; Disposition: unknown.

11. Arrested or received 4/4/84 - Memphis, TN Sheriff's Office; Charge: aggravated assault and aggravated kidnapping; Disposition: unknown.

12. Arrested or received 5/1/84 - Memphis, TN Correction Center; Charge:

attempting to commit a felony by passing bad checks; Disposition: 1 year confinement.

13. Arrested or received 7/9/86 - West Tennessee Reception Center, Memphis, TN; Charges: receiving and concealing stolen property; Disposition: 8 years confinement. (May be disposition of charges set out in No. 10 above.)

14. Arrested or received 8/25/88 - Collierville, TN Police Department; Charge: receiving and concealing stolen property; Disposition: unknown.

15. Arrested or received 12/2/88 - Memphis, TN Sheriff's Office; Charge: convicted felon carrying a firearm; Disposition: unknown.